



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 717 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

JAMES KINYUA.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

The Claimant filed his Memorandum of Claim on 3rd August 2011 in which he avers that he was wrongfully dismissed from employment by the Respondent. He prays for payment of maximum compensation for wrongful dismissal.

The Respondent filed its Statement of Response on 20th February 2012 denying the averments in the Claim. It contends that due process was followed before the termination of the claimant's employment and that the Claimant is not deserving of any relief or remedy.

At the hearing the Claimant testified on his behalf while the Respondent's Chief Personnel Officer, PETER MAINA MBUTHIA (RW1) testified on its behalf. Thereafter, each of the parties filed its respective submissions.

Claimant's Case

The Claimant, CW1, testified that he was employed by the respondent on 2nd October 1968 and that he worked for 23 years. He testified that he was promoted to position of Chief Head Night Custodian and that he held that position until 1990. His last salary was Kshs.13,500. He testified that on 29th November 1989 he received a letter suspending him from duty but the letter did not state what he had done. That the letter stated that he was being suspended for some irregularities. That during the suspension he received half salary.

He testified that he received another letter dated 30th April 1990 stating that he had conducted himself in a disgraceful manner. That he was neither invited to a hearing nor was he given an explanation of what he had done. It was his case that he was never involved in any misconduct or insubordinate conduct. He further testified that his supervisor never raised any complaint against him.

He testified that he received a letter of termination dated 3rd September 1990 but he was not informed of the reason for the termination. He appealed against the decision terminating his employment and he received two letters dated 26th March 1992 and 23rd July 1992, both informing him that his appeal was not successful. He appealed again on 28th November 2003 and the Respondent responded on 15th July 2004.

In cross-examination the claimant testified that he did not receive the confidential report that was referred to in the letter dated 30th April 1990. He testified that the letter dated 7th October 1991 stated that he received full terminal benefits but the terminal benefits that he was paid was minimal.

Respondent's case

PETER MAINA MBUTHIA, RW1, testified that he has been the Chief Personnel Officer at Student Welfare Authority for the Respondent since 1992. He testified that the Claimant was paid all his terminal benefits including gratuity and that no other allowances are payable to the Claimant.

In cross-examination, he testified that at the time the Claimant was employed in 1990 he was not an employee of the Respondent and that he

was relying on the university records of which he is the custodian. He testified that the Respondent did not communicate to the Claimant the date, venue and time of Disciplinary Committee and that there was no disciplinary hearing.

He testified that the appeal to the Vice Chancellor was never heard but the appeal was responded to administratively. He testified that under the University Terms of Service, Clause 6(b), the University could terminate employment without assigning a reason.

Submissions

In his written submissions the Claimant argued that he was never

given an opportunity to be heard before the Management Staff Review Committee. He submitted that he was discriminately terminated as evident from the minutes of the Committee meeting held on 25th July 1990. He relied on Article 27 of the Constitution and Section 5(3) of the Employment Act, which prohibit an employer from discriminating an employee. He urged the Court to award him Kshs.10,000,000 as damages for discrimination and unfair labour practices. In support of this argument he relied on the decision in **James Mulinge v Freight Wings [2016] eKLR** in which the court stated –

“The claimant was dismissed at his prime, he was aged 40 years at the time and has since not been able to secure new employment. The damages awarded have put into account the trauma and losses incurred as a result of the wrongful dismissal that was part of a series of discriminatory and unfair labour practices against the claimant. Noting the circumstances of this case damages are hereby assessed and awarded at Kshs.5,000,000/=”

The Respondent on its part submitted that it terminated the Claimant’s employment pursuant to Clause 6 (b) of the Claimant’s terms of service. It submitted that there was no provision in the Claimant’s terms of service requiring the Respondent to give reasons for termination. That the claimant cannot ask this Court to rewrite the contract. That there was an express term in the contract therefore there is no need to imply a term. It relied on Section 16 of the repealed Employment Act Cap 226 and submitted that the Employment Act Cap 226 (then) did not require employers to assign reasons for termination. It relied on the decision in **Joseph Ndambuki and 4 Others -V- Delmonte Limited (2012) eKLR** where the court upheld the validity of termination at the will of the employer.

The respondent also relied on **Civil Appeal No. 269 of 2003, Walter Musi Anyango –V- Hilton International Kenya Limited and Another (2008) eKLR** where the court stated that there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract.

The respondent also relied on the case of **Kenfreight (E.A. Limited -V- Benson K. Nguti (2016) eKLR** where the plaintiff’s contract having been terminated strictly in accordance with the contract of service the court held that the plaintiff was lawfully dismissed.

It submitted that the Claimant was only entitled to notice or salary in lieu of notice.

Determination

It is uncontested that the Claimant was employed by the Respondent and was terminated vide a letter dated 3rd September 1990 with the outcome of his appeals upholding the decision to terminate him.

Prior to his termination, the Claimant was suspended from duty on 22nd November 1989 on grounds that he was involved in some irregularities. The Respondent set out the particulars of the irregularities in its letter dated 30th April 1990 to the effect that the Claimant had conducted himself in a disgraceful manner and had also undermined his superiors. After suspension the Respondent resolved to terminate the Claimant’s employment vide its letter dated 3rd September 1990, as recommended in the Minutes of the Management staff Review Committee Meeting held on 25th July 1990. The cause of action herein took place in 1990 and as at that time the applicable statute was the Employment Act Cap 226 (now repealed) thus the provisions of the Constitution of Kenya, 2010 and the Employment Act 2007 do not apply as submitted by the Claimant. This is due to the rule against the retrospective application of the law.

In the termination letter dated 3rd September 1990, the Respondent stated that the Claimant was being terminated in accordance with Clause 6(b) of the Terms of Service, which provided:

“After confirmation in the service of the University on completion of probation following on first appointment, services may be terminated at any time by either party giving the other three months written notice of intention to terminate the appointment or alternatively by either party paying the other three months basic salary in lieu of notice.”

Section 16 of the Employment Act, Cap 226 (now repealed) provided that:

“Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.”

Under Cap 226 it was not mandatory for the employer to give reasons for termination or to give an employee an opportunity to be heard. The requirement to give reasons prior to termination and to have an employee heard prior to termination came into force under the Employment Act, 2007. In **Ezekiel Nyangoya Okemwa -V- Kenya Marine & Fisheries Research Institute [2016] eKLR** Rika J held:

“In the Court of Appeal of Kenya decision Kenya Revenue Authority v. Menginya Salim Murgani [2010] eKLR, the Court held that [prior to 2007] Employers had no obligation in observing principles of natural justice, in termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause.”

The Claimant avers that he was discriminately terminated as the recommendation of the Management staff Review Committee meeting held on 25th July 1990 recommended his termination while the suspension of one of his colleagues was upheld. According to minutes, the Committee expressed that its resolutions to take different steps in relation to the claimant and the other employee was made after its consideration of the confidential reports, the conduct and performance of each employee and the effect of his or her continued employment.

The Court finds that the Claimant has not proved that he was discriminated upon as the Management Staff Review Committee meeting did not terminate the Claimant alone but also terminated other staff members as charged based on the cases against them and the investigation reports.

Having found that the Claimant was not unlawfully terminated, this Court finds that the Claimant is not entitled to compensation as prayed. Pursuant to Section 16 of the repealed Employment Act Cap 226, the Claimant was to be paid his salary arrears and 3 months' salary in lieu of notice. The Claimant testified that he was paid his dues though according to him the amount was not adequate. He did not pray for payment of any terminal dues other than maximum compensation, which he is not entitled to as this was introduced in the Employment Act, 2007 which was not in force then.

The Court therefore finds that the claim is unmerited and claim therefore fails. The same is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE